(1) Supreme Court, U.S.
FILED

96 947 DEC 9 1996

No. 96-

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IN THE

Supreme Court of the United States

October Term, 1996

JODY H. DERAMUS,

Petitioner,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

55 pp

QUESTIONS PRESENTED

1. In a diversity case raising novel and important issues of Mississippi law and public policy as to the liability of a foreign insurance company arising from its failure to disclose to its insured, to his wife, or to state medical authorities that the company's medical examination had found the husband to be infected with the AIDS virus, should the court of appeals have certified the state law issues to the Mississippi Supreme Court for an authoritative decision, rather than adopting the district court's "*Erie* guess" as to how the state court would rule?

2. Did the court of appeals necessarily violate the *de novo* standard of review mandated under *Salve Regina College v. Russell* by merely adopting, *in toto* and without comment, the district court's "*Erie* guess" on each issue of state law?

PARTIES

All parties to the proceeding in the court of appeals are identified in the caption. Jane Doe and John Doe are fictitious names that were used at times in the proceedings below in reference to Petitioner and her late husband.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jody H. Deramus, appearing individually and in her representative capacity as Administratrix of the Estate of Frank Deramus, deceased, respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in that court's docket No. 95-60675.

OPINIONS BELOW

The memorandum opinion and order of the District Court for the Southern District of Mississippi, Jackson Division, Civil Action No. 3:92-cv-225WS, is set forth in the Appendix at pages A1-A22, and that court's final judgment is reproduced at page A23. The decision of the Fifth Circuit, which affirmed the district court ruling and adopted its memorandum opinion and order without further comment, is set forth in the Appendix at page A24. That decision is reported at 92 F.3d 274 (5th Cir. 1996), incorporating the district court opinion as an attachment. The order of the Fifth Circuit denying rehearing and rehearing en banc, printed at page A25 of the Appendix, is not officially reported.

JURISDICTION

The judgment of the court of appeals, of which review is sought by Petitioner, was entered August 7, 1996. (A24). A timely request for rehearing was denied by the court of appeals on September 10, 1996. (A25). Jurisdiction is conferred upon this Court to review the judgment by 28 U.S.C. § 1254(1).

RULES INVOLVED

Mississippi Rules of Appellate Procedure:

RULE 20. CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) When Certified. When it shall appear to the Supreme Court of the United States or to any United States Court of Appeals that there may be involved in any proceeding before it questions or propositions of law of this state which are determinative of all or part of that cause and there are no clear controlling precedents in the decisions of the Mississippi Supreme Court, the federal court may certify such questions or propositions of law of this state to the Mississippi Supreme Court for rendition of a written opinion concerning such questions or propositions of Mississippi law. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

(b) Method of Invoking Rule. The provision of this rule may be invoked by the federal court, upon its own motion or the suggestion or motion of any interested party when approved by the federal court.

* * *

STATEMENT

In early 1988, Frank Deramus of Louisville, Mississippi, a policyholder of Respondent Jackson National Life Insurance Company, a Michigan corporation, applied to the company for additional term coverage. His wife, Petitioner Jody Deramus, likewise applied for a Jackson National Life policy as replacement for a policy on her life issued by Equitable Life Assurance Society. Respondent required

medical examinations of both applicants. After receiving the results of their tests, Respondent denied the additional coverage that Mr. Deramus had requested. A few days later it accepted the coverage applied for by Petitioner and issued a policy on her life.

At first Respondent falsely informed Mr. Deramus that his application for additional insurance was turned down for the reason that "delivery of the policy was not accepted." Later Respondent wrote to its licensed agent in Columbus, Mississippi that he had been rejected "due to confidential medical information." Respondent did not comply with repeated oral and written requests for particulars; although it promised to supply the information to Mr. Deramus's designated physician, it failed to do so. Letters sent by Mr. Deramus to Respondent, asking the company to provide his doctor with all information about his medical condition, were not even answered.

The actual reason that Respondent denied additional coverage was its discovery that — unknown to Mr. Deramus or his wife or his physicians — he had the AIDS virus. The company learned this from the results of HIV Western Blot Banding Pattern and ELISA blood tests, repeatedly reconfirmed by its testing laboratory. The test results were received by Respondent's medical director, Lewis Stewart, M.D. on April 21, 1988.

Still, Respondent failed to inform Mr. Deramus, his doctors, or his spouse, of the positive HIV test results or the reason for its rejection of his application. Mississippi, like Respondent's domicile state and most other states, has a strong public policy that all cases of "reportable" diseases, including AIDS and other sexually transmitted diseases, be

reported to state health authorities, that appropriate counseling be provided for victims, and that preventive measures be taken to protect others from infection. See, *e.g.*, Mississippi State Department of Health, Rules and Regulations Governing Reportable Diseases (1985). The company neither arranged nor suggested any follow-up counseling efforts and did not even report to state health authorities the fact that Mr. Deramus had tested positive. Nothing was done to see that Jody Deramus was appropriately warned of the risk of HIV infection from her husband. In fact, the record shows that Mr. and Mrs. Deramus were actively trying to conceive a child during that period. Since Mr. Deramus had never engaged in homosexual activity or any other activity which would place him in a known risk group for the disease, they had no reason to suspect the possibility of HIV infection. The fact that Petitioner was issued a new policy at the same time her husband was declined coverage appeared to rule out the possibility of his having a fatal infectious disease that could be transmitted to her through normal marital relations.[1]

Frank Deramus grew progressively ill over the year and a half following the rejection of his insurance application, and during that time he saw and was treated by at least 26 physicians for his unexplained illness. Still, the critical and unambiguous test result that Respondent had received was not disclosed to Mr. Deramus or to any of his doctors, and none of them diagnosed the nature or source of his problem. In October, 1989, Mr. Deramus was hospitalized at the Johns

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[1]Respondent's own underwriting guidelines, consistent with industry practice, called for rejection of applicants who were exposed to AIDS infection through sexual contact.

Hopkins Medical Center in Baltimore. There, for the first time, he learned that he had the AIDS virus.

For 18 months the insurance company, with certain knowledge that Frank Deramus was infected, deliberately kept the information secret from the couple as well as their doctors. But, also unknown to Mr. Deramus and his wife, who was the named beneficiary of his existing $500,000 policy, Respondent had immediately placed a conspicuous notice in its internal policy file, in large hand-written letters: "DO NOT REINSTATE". That meant that, in the event Mr. Deramus might inadvertently forget to make a premium payment on time, permitting Respondent to cancel his policy, the company's normal reinstatement procedures would not be honored — with the result that a $500,000 death benefit would not have to be paid when he died. Although it did not tell its insured or state health officials, Respondent immediately shared its "confidential medical information" concerning Mr. Deramus's abnormal blood test with over 600 companies that subscribe to the Medical Information Bureau, an insurance industry health information databank.

During that 18-month period of concealment, before they learned the truth at Johns Hopkins, Petitioner and her husband were deprived of the opportunity to seek medical treatment that could have extended and enhanced his life, and of the opportunity to protect Petitioner from the risk of getting AIDS from her husband.

Frank Deramus died of AIDS on June 28, 1991. Nine days earlier, after three-plus years of concealment and broken promises, Respondent finally sent the 1988 HIV test results to Mr. Deramus's physician.

* * *

After the death of her husband, Petitioner asserted claims on her own behalf and for her late husband's estate against Respondent in an action filed in Circuit Court for Hinds County, Mississippi. The suit sought damages for exposing her to the risk of AIDS infection, by lulling her into a false sense of security that her husband did not have a deadly sexually-transmitted infection when it issued a policy on her life. It also sought recovery from Respondent on various legal grounds for having failed and refused to disclose Mr. Deramus's HIV infection to him or his doctors. Respondent promptly removed the case to the United States District Court for the Southern District of Mississippi, based on diversity of citizenship.

In September, 1995, the district court granted summary judgment in favor of Respondent. Acknowledging that the issue of the insurance company's duty of disclosure of HIV infection was unsettled under Mississippi law, the district court faced the need to prophecy how the highest state court would rule:

> The Mississippi courts, thus far, have not yet spoken definitively to the question of whether an insurer has a duty to disclose to insurance applicants the results of medical examinations which detect that an applicant is suffering from a life-threatening or debilitating disease. Since Mississippi has not directly addressed this issue, this court must make an *Erie*-guess as to how the Mississippi Supreme Court would rule. (A7-A8).

Its guess led the district court to conclude that Petitioner's claims would not be deemed legally sufficient under the law of Mississippi, if decided by the state court. The district court largely limited its review to several past decisions of the Mississippi Supreme Court, arising in other distinguishable contexts and factual settings. It did not undertake to evaluate decisional trends or consider other indicators of public policy, such as legislative or regulatory pronouncements, that might be taken into account by the state court were the case in fact presented to it. The district court took an extremely narrow view of the personal claims asserted by Petitioner, affording them almost no consideration except as a tag-along to the claims of her deceased husband. The fact that Respondent made what could readily be viewed as a lulling misrepresentation to Petitioner, in issuing her a new life insurance policy while denying her husband's application because of the undisclosed HIV infection, was not discussed. Nor did the court explain why the year and a half of unnecessary and unwitting exposure to AIDS infection, and Petitioner's subsequent anguish and lingering fear of infection which arose when she learned the truth, could not be redressed under the law of Mississippi. However, based on its "*Erie*-guess", final judgment was entered against Petitioner by the district court, dismissing each and every claim.

On appeal, the court of appeals affirmed the judgment. It issued a one-sentence per curiam order, adopting *in toto* the district court's opinion as the basis for its decision, without any other substantive discussion or explanation. Thereafter rehearing was denied in a form order, with no comment.

REASONS FOR GRANTING THE WRIT

I

To promote the objectives of uniformity among the circuits, enlightened and cooperative federalism, and adherence to this Court's own standards for avoiding unnecessary and imprudent "*Erie* guess" decisions on important issues of state law as yet undetermined by state courts, the Court should exercise its supervisory powers to require that federal courts of appeals certify such issues to state courts, where certification procedures are available, in the absence of some clear and expressed reason not to do so.

A. This Court's decisions establish that certification should be utilized in appropriate cases to promote cooperative judicial federalism, prudent use of judicial resources, and correct results.

Ever since *Clay v Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), this Court has encouraged use of state-enacted certification procedures, under which federal courts may submit issues of state law to a state's highest court for authoritative determination. Certification of unsettled state law questions has turned out to be a brilliant innovation and one of the great success stories of cooperative federalism.

Use of the procedure was wholeheartedly endorsed in *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), because certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." Later in *Belloti v. Baird*, 428 U.S. 132, 150-51 (1976), the Court noted the considerable advantages of certification over abstention, holding that the construction

of a Massachusetts law should have been certified to the Supreme Judicial Court of Massachusetts, and directing the lower court on remand to do so. In *Salve Regina College v. Russell*, 499 U.S. 225, 237 n.4 (1991), the Court again noted that, "Of course, a question of state law usually can be resolved definitively if the litigation is instituted in state court and is not finally removed to federal court, or if a certification procedure is available and is successfully utilized." See also, *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978)("In a federal system, it is obviously desirable" for vitally important issues of state law and public policy to be "decided in the first instance by state courts....[W]here as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)("Speculation by a federal court about the meaning of a state statute in the absence of a prior state court adjudication is particularly gratuitous when...the state courts stand willing to address questions of state law on certification from a federal court."); *Houston v. Hill*, 482 U.S. 451, 475 (1987)(Powell, J., dissenting) ("The Court repeatedly has emphasized the appropriateness of certification in cases presenting uncertain questions of state law."); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988)(state law issues certified *sua sponte* to Virginia Supreme Court).

Nevertheless there remains a lack of clarity as to when federal courts should certify issues of state law. Obviously, most issues of state law in federal litigation do not warrant use of the device, because usually the state rules of decision are relatively clear. But there are numerous cases where the answers are far from clear, the issues are vitally important to

the states and their citizens, and there exists no pressing urgency, in which federal circuit courts are still engaging in unnecessary and inferior "*Erie*-guess" decision making. There is still confusion as to how the doctrine of *Meredith v. Winter Haven*, 320 U.S. 228 (1943), addressing *Pullman*-type abstention, should apply to the use of certification procedures, if at all. See 17A Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4246 (2d ed. 1988).

Lehman Brothers v. Schein left the use of certification to "the sound discretion of the federal court." 416 U.S. at 391. Additional guidance from this Court to aid and inform that discretion is now appropriate, in view of the enormous growth in availability of state law certification procedures since *Lehman Brothers* was decided in 1974.[2] At the least, circuit courts which engage in self-described "*Erie* guesses", despite the availability of certification procedures for referral to state courts, should be required to explain why they are not following the preferred route of certification.

Greater use at the appellate level of certification rather than speculation to resolve important, unsettled state law questions is entirely consistent with, if not implicitly required by, the decision in *Salve Regina College v. Russell, supra.* Under that decision, circuit judges may no longer give deference to their district court counterparts on matters of

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[2]At least 43 states, the District of Columbia and Puerto Rico now provide for certification of state law issues by federal circuit courts, and the Judicial Conference of the United States adopted a formal recommendation in 1995 endorsing procedures for submission of novel or difficult state law questions. *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291, 303 (3rd Cir. 1995)

state law. Therefore, unless they use certification, circuit court panels must engage in their own *de novo* predictions on difficult state law issues. That process will necessarily entail substantial judicial time and effort. The guesses may be incorrect and subject to later disapproval by the state courts, are likely to result in inconsistent rules, and will create incentives for forum shopping. All of these consequences can be avoided or at least minimized by judicious referrals of the unclear state law issues to the appropriate state courts with the unique competence to make such rulings.

B. Some of the circuits have been following this Court's lead enthusiastically, with demonstrably successful results.

Certification is now frequently used by federal appellate courts, especially in diversity cases, as "a means to obtain authoritative answers to unclear questions of state law," *Toner v. Lederle Laboratories*, 779 F.2d 1429, 1432 (9th Cir. 1986)(Kennedy, J.). Consistent with practice in this Court, certification of uncertain state law issues is typically ordered on the referring court's own motion. 17A Wright, Miller & Cooper, *supra* § 4248, 176; see, *e.g.*, *Aldrich v. Aldrich*, 375 U.S. 75, 249 (1963)(per curiam)(*sua sponte* referral of "questions of Florida law that are determinative of this cause, with respect to which questions there seem to be no clear controlling precedents in the decisions of the Supreme Court of Florida"); *Computer Associates Int'l, Inc. v. Altai, Inc.* 22 F.3d 32 (2d Cir. 1994)(whether discovery rule operates to toll limitations as to alleged trade secret theft under Texas law certified *sua sponte* to Texas Supreme Court); *Colonial Properties, Inc. v. Vogue Cleaners, Inc.*, 77

F.3d 384, 386-87 (11th Cir. 1996) (*sua sponte* certification of trespass issue under Alabama law); *Protective Life Insurance Co. v. Sullivan*, 89 F.3d 1 (1st Cir. 1996) (interpretation of Massachusetts incontestability statute certified *sua sponte* to state Supreme Judicial Court).

The Eleventh Circuit appears to apply a presumption in favor of certifying unsettled state law issues when possible. For example in *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913 (11th Cir. 1995), the court stated that

> [w]here there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* "guesses" and to offer the state court the opportunity to interpret or change existing law.

Id., 916-17 (footnote omitted). Likewise the Eleventh Circuit in *Colonial Properties, supra*, stated:

> While the district court may have been entirely correct in its prediction..., the fact remains that this is a case of first impression under Alabama law. Rather than speculating about how the Alabama courts would answer this question, we prefer to certify the issue for resolution by the Alabama Supreme Court.

77 F.3d at 386-87. *Accord, Adelberg v. Berkshire Life Ins. Co.* 97 F.3d 470 (11th Cir. 1996).

Other circuits have acted accordingly. See, *e.g.*, *Wecker v. Kilmer*, 471 F.2d 782, 783 (7th Cir. 1972)(Stevens, J.)("It

appears to this court that the question...is controlled by the law of the State of Indiana; that the answer to that question will determine this appeal; that there are no clear controlling precedents in the decisions of the Supreme Court of Indiana; and that, accordingly, this is an appropriate question to be certified to that Court...."); *Toner v. Lederle Laboratories, supra*, at 1430 ("resolution of this appeal requires us to address unsettled questions of Idaho law, and we deem it appropriate to permit the judicial system of that state to address those matters."); *Delaney v. Cade*, 986 F.2d 387 (10th Cir. 1993)(certification made to Kansas Supreme Court "[c]onsistent with our judicial policy that matters of state law should first be decided by state courts"). Judges of the Third Circuit likewise believe that certification to the state court is appropriate "when (1) the issue is one of importance; (2) it may be determinative of the litigation; and (3) state law does not provide controlling precedent through which the federal court could resolve the issue." *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291, 303 (3rd Cir. 1995)(Becker, J., dissenting on the merits but "enthusiastically" joined on this point by the two other panel members, see *id.* 293 n. 2).

The availability and efficacy of procedures to certify uncertain issues of state law has made the "*Erie* guess" predictive technique an outmoded relic. A more explicit preference for use of certification where available is consistent with federalism principles, as reflected in *Erie*, and would have a number of salutary effects. For example, "wrong" guesses by federal circuit courts which have later been disapproved or "reversed" by state court judges are numerous and well documented. See, *e.g.*, D. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679-81 (1992); S.

Smetanka, *To Predict or to Certify Unresolved Questions of State Law: A Proposal For Federal Court Certification to the Pennsylvania Supreme Court*, 68 Temp. L. Rev. 725 (1995). That awkward and unseemly situation is avoided entirely if the state law issues have been referred to and resolved by state courts. Moreover, for federal judges to admit that they have only "guessed" as to what the applicable law is, when a simple and relatively efficient procedure exists to determine it with certainty, casts discredit on the judicial system and is inherently inconsistent with their obligations under *Erie* and *Salve Regina*. Certification likewise helps avoid inconsistent answers to important questions of state law, the untoward effects of *Erie* guessing on the development of state law, and incentives for forum shopping.

C. The Fifth Circuit, as epitomized by this case, where the panel neither considered the available option of certification nor purported to meet its obligation under *Salve Regina* to make a *de novo* prediction of state law, has become notably resistant to use of certification.

Notwithstanding its success as an alternative to the "*Erie* guess" technique of predicting state law, certification is not being used in all or nearly all appropriate cases. According to a survey by the American Judicature Society, cited by Judge Becker in *Hakimoglu v. Trump Taj Mahal Associates*, *supra*, 70 F.3d at 303, only 54 percent of the federal circuit judges who responded expressed willingness to certify state law questions, while 80 percent of the state supreme court justices were willing to answer certified questions. American Judicature Society, Certification of Questions of Law: Federalism in Practice 43, 46 (1995).

However, 95 percent of the circuit judges and 87 percent of the state justices, reflecting on their most recent certified case, were satisfied with the process. *Id.* 42-43. These results indicate that (a) certification of state law issues is working very well, but (b) a substantial portion of the federal appellate bench is still resistant to or unaware of the benefits of certification. Resistance is most evident in decisions of the Fifth Circuit, which appears to have taken a considerable step backward in recent years.

Under the prodding of the late Chief Judge John R. Brown, the Fifth Circuit previously took a prominent role of leadership in the effective and appropriate use of certification to state courts. Thus in *Barnes v. Atlantic & Pacific Life Ins. Co.*, 514 F.2d 704, 705 (5th Cir. 1975), "a historic case, not because of the intrinsic difficulty of the issues, but because this is our first published opinion utilizing the certification provisions recently adopted by the citizens of Alabama", the court wrote:

> While we do not denigrate the conclusions of the District Judge, we select the certification option because of the uncertainty of the Alabama law governing this case. This uncertainty coupled with the not infrequent result that a Federal Court of Appeals is "reversed" by the highest court of the *Erie* state make this a peculiarly appropriate case for certification. * * *
>
> When the state law is in doubt especially on the underlying public policy aims, it is in the best administration of justice to afford the litigants a

> consistent final judicial resolution by utilizing the certification procedure.

Id. 706 (footnotes omitted). The court in *Walters v. Inexco Oil Co.*, 670 F.2d 476, 477 (5th Cir. 1982), "[g]uided by principles of Our Federalism," certified a state law question to the Supreme Court of Mississippi, because:

> Whether the [state] statute should apply in the present action, we simply cannot tell. Concerned not to violate our *Erie* duty of applying the substantive law of the forum state in a diversity case, we seek a definitive answer to this question from the one court both intellectually capable *and* constitutionally entitled to supply one. Indeed, as the case involves questions of local Mississippi policy, this course accords with our carefully wrought system of federalism. We should hesitate to "trade [our] judicial robes for the garb of prophet", J. Brown, *Certification—Federalism in Action*, 7 Cumberland L. Rev. 455 (1977), when the procedure of certification to the Supreme Court of Mississippi renders the crystal ball unnecessary. In following that course, we once again seize the opportunity to praise, extol, laud, and proclaim the virtues of this wonderful device that "without abdicating one Article III function", *Strange v. Krebs*, 658 F.2d 268, 269 (5th Cir. 1981), enables us to obtain a definitive answer when *Erie* charts a perilous course through uncharted waters.

Id., 478 (footnotes omitted), citing *Erie Railroad Co. v Tompkins*, 304 U.S. 64 (1938).

Despite Judge Brown's contributions, however, the Fifth Circuit was already moving in the opposite direction before his death in 1993. See, *e.g.*, *American Waste & Pollution Control Co. v. Browning-Ferris, Inc.*, 949 F.2d 1384, 1392 (5th Cir. 1991)(court declines request for certification and decides novel issues of Louisiana tort law and statutory construction by "*Erie* guess"). Judge Brown strongly dissented from the court's refusal in that case to certify the state law issues: "Floundering around, at best, in an effort to predict what the Supreme Court of Louisiana would do, we deny, not only to the parties but to the jurisprudence of Louisiana as well, the opportunity to obtain an authoritative answer to the problem facing this panel." *Id.*, 1395.

Regrettably, the Fifth Circuit is now consistently ignoring the availability of and need for certification while struggling with difficult and unsettled issues of state law. See, *e.g.*, *Lawrence v. Virginia Insurance Reciprocal*, 979 F.2d 1053 (5th Cir. 1992)(making "*Erie* guess" and rejecting request for certification as to sovereign immunity of community hospital and insurance coverage issue under Mississippi law); *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1389, 1399 (5th Cir. 1992) ("*Erie* guess" made on unsettled points of Mississippi strict liability and negligence doctrines, over vigorous dissent, with no consideration of certification); *Labiche v. Legal Security Life Ins. Co.*, 31 F.3d 350, 352, 354 (5th Cir. 1994)(because Louisiana Supreme Court had not ruled on dispositive insurance law issue, "we are constrained to make an '*Erie* guess' on how that court would rule" although concurring judge objects to

panel's refusal to certify); *Willis v. Roche Biomedical Laboratories, Inc.*, 61 F.3d 313 (5th Cir. 1995) ("*Erie* guess" made as to Texas negligence law without considering certification); *Scottish Heritable Trust v. Peat Marwick Main & Co.*, 81 F.3d 606, 613 (5th Cir. 1996) (making "*Erie* guess" as to scope of accountants' liability to third parties under Texas law, without considering certification); *Trient Partners I Ltd. v. Blockbuster Entertainment Corp.*, 83 F.2d 704 (5th Cir. 1996)("Recognizing the dangers of making an 'Erie guess,'" but again without considering certification, court decides unsettled issue of Texas contract law).

The present case exemplifies the policy now being followed in the Fifth Circuit — charging ahead with speculative answers on broadly important and unsettled issues of state law and public policy, while ignoring the availability of certification procedures in every state within the circuit. The practice is not only improvident and contrary to comity and federalism principles, but it conflicts with the practices of this Court and other circuits.

D. Requiring greater use of certification will alleviate demands on this Court's GVR mechanism and the problems discussed in *Thomas v. American Home Products*.

Disciplined utilization of certification procedures will solve at least part of the dilemma posed by this Court's GVR caseload — those cases where the Court summarily grants certioriari, vacates the decision of a circuit court of appeals, and remands for further consideration in the light of an intervening state court decision, even though the matter may not otherwise meet the criteria for review on certiorari. See,

e.g., *Thomas v. American Home Products, Inc.*, 117 S.Ct. 282 (1996), and the concurring opinion of Justice Scalia and the dissent of Chief Justice Rehnquist. Many of these cases are products of wrong "*Erie* guesses" by the circuits. In *Thomas*, for example, contrary to its otherwise exemplary practice and as if to demonstrate that nobody's perfect, the Eleventh Circuit twice ignored the availability of certification to the Supreme Court of Georgia on issues of Georgia law in product liability litigation, twice made *Erie* guesses, and twice got them wrong. Such problems and the perceived need for intervention by the Supreme Court largely dissolve if the circuit court determines the dispositive state law issues by means of certification to the state court.

II

The circuit court's peremptory acceptance of the "*Erie* guess" made by the district court on an issue of wide public importance to the people of Mississippi, without comment and without consideration of a vital issue ignored by the district court, constitutes a clear departure from this Court's ruling in *Salve Regina*.

It is impossible to tell from its order whether the court of appeals in this case complied or did not comply with the *de novo* standard of appellate review mandated by *Salve Regina, supra*. The court failed to state what standard of review it believed was applicable or to give any explanation of its decision to affirm the judgment below, other than to adopt the reasoning stated by the district court in its memorandum opinion. If anything, the words used by the court in its cryptic, *per curiam* order imply deference rather than independent analysis, as does the fact that the points

made by Petitioner as to errors in the lower court's opinion were ignored. Furthermore, the district court had no alternative to making an "*Erie* guess", as no procedure for certification was available at that level. See Miss.R.App.P., Rule 20. Unlike the district court, the court of appeals did have the option to certify, but made no mention of that distinction and no explanation of why it opted in favor of an "*Erie* guess" by the lower court, rather than certification — again suggesting improper deference.

The content of the district court's opinion, which the Fifth Circuit adopted as setting forth the "basis" for its affirmance, substantiates that its review could not have been *de novo*. Important potential sources of liability asserted by Petitioner were not addressed. For example, as part of her individual claim Petitioner submitted an affidavit in the district court establishing that she relied on Respondent's issuance of her policy of life insurance in 1988 as an assurance that the reason for its rejection of her husband's application could not have been a deadly contagious disease. Ignoring that undisputed summary judgment evidence, the district court failed to offer any explanation of why Petitioner's reliance would have been unreasonable in the circumstances and why it could not have established liability for fraud or negligent misrepresentation under Mississippi law. The court of appeals, affirming the grant of summary judgment as to that aspect of her claim "on the basis of" the district court opinion which did not address it, could not have been exercising independent, *de novo* review of the state law issues. Nor did the court of appeals even claim that it had performed such a review. In these circumstances, it clearly violated the obligations imposed by *Erie* and *Salve Regina*, calling for reversal by this Court for that reason.

CONCLUSION

The Court should issue a writ of certiorari to review the decision of the court of appeals, which should thereupon be vacated and remanded with instructions to certify the issues of state law to the Supreme Court of Mississippi pursuant to Rule 20 of the Mississippi Rules of Appellate Procedure.

Respectfully submitted,*

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Dated: December 9, 1996

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*Petitioner and her counsel express their appreciation for the assistance of Rachel Clark of Harvard Law School in preparing this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:92-cv-225WS

JANE DOE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN DOE — PLAINTIFF

vs.

JACKSON NATIONAL LIFE INSURANCE COMPANY — DEFENDANT

MEMORANDUM OPINION AND ORDER

Both the plaintiff and defendant herein contend that under the undisputed facts each is entitled to a judgment against the other. Defendant Jackson National Life Insurance (hereinafter "JNL") has submitted alternative motions under Rules 12(b)(6)[1] and 56(b),[2] Federal Rules of Civil

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[1]Rule 12(b)(6) of the Federal Rules of Civil Procedure provides:

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> > (b) failure to state a claim upon which relief can be granted, ...

[2]Rule 56(b) of the Federal Rules of Civil Procedure provides:

> (b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory

(continued...)

Procedure, respectively, asking this court to dismiss plaintiff's action for failure to state a claim, or for summary judgment. Plaintiff Jane Doe,[3] individually and as administratrix of the Estate of John Doe (hereinafter "plaintiff" or "Doe") opposes defendant's motion, while submitting her own motion under Rule 56(a),[4] Federal Rules of Civil Procedure, asking this court to hold that under the undisputed facts defendant is liable to plaintiff. While the parties champion their respective positions and sharply disagree over the proper outcome of these motions, the parties are in accord over the identity of the key question and factual underpinnings of this litigation. In this diversity-of-citizenship action, our widowed plaintiff, Jane Doe, contends that JNL breached its duty to her, as well as to her deceased husband, John Doe, to inform them or

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[2](...continued)

judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

[3]Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) (holding that after "a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally-embedded presumption of openness in judicial proceedings," a party may be permitted to proceed under a fictitious name.

[4]Rule 56(a) of the Federal Rules of Civil Procedure provides:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part, thereof.

their designated physician of John Doe's HIV-positive condition, when, during JNL's processing of John Doe's application for insurance which included a mandatory medical examination, JNL had discovered that circumstance, but did not reveal this information to the Does. Plaintiff has fired a volley of legal theories at the court which, according to plaintiff, shows that JNL owed a duty to plaintiff under Mississippi law and the factual circumstances peculiar to this case. Unfortunately for plaintiff, this court is persuaded that plaintiff's arguments miss the mark and that summary judgment, while appropriate, must be entered for the defendant. Making an Erie-guess, this court holds that under Mississippi law an insurer has no duty to inform an insurance applicant of the results of a medical examination where the insurer administers the examination only to determine the insurability of the applicant.

PARTIES AND JURISDICTION

Jane Doe is an adult citizen of a State other than Michigan and serves as Administratrix of the Estate of John Doe, her husband, who died in the state of plaintiff's residence.

Defendant JNL is a life insurance company incorporated in Michigan with its headquarters in Lansing, Michigan. JNL is licensed to do business in Mississippi and has designated Cary Bufkin, Esq., of Jackson, Mississippi, as its agent for service of process.

This court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1332,[5] diversity of citizenship.Since the court's jurisdictional grant is based upon diversity of citizenship, and since the factual backdrop of this dispute occurred in Mississippi, this court applies the substantive law of Mississippi to this dispute. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); Boardman v. United Service Auto. Association, 742 F.2d 847, 849 (5th Cir. 1984); Mitchell v. Craft, 211 So.2d 509, 516 (Miss. 1968) (Mississippi choice of law rules direct its courts to apply a center of gravity test.).

FACTS

In January, 1988, Mr. Doe had a life insurance policy with defendant which provided coverage of $500,000.00. Desiring additional life insurance, Mr. Doe applied for an increase of $300,000.00. Mrs. Doe simultaneously submitted an application for $250,000.00 of life insurance to replace a policy she held with another insurance company.

As part of its application process, JNL required its applicants to submit to medical examinations at Examination Management Services, Inc., (EMS), a paramedical facility designated by JNL. These examinations, which included

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[5]Title 28 U.S.C. § 1332 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interests and costs, and is between--

(1) citizens of different States; ...

blood and urine tests, were vital to JNL's underwriting procedure. JNL reserved the right to refuse coverage if an applicant failed the medical examination. No one disputes that it was JNL's policy at the time to deny life insurance coverage to any individual who tested positive for the Human Immunodeficiency Virus (HIV), also known as the Acquired Immune Deficiency Syndrome (AIDS) virus. So, as part of its medical examination, JNL tested the blood of its applicants to detect any presence of antibodies or antigens to HIV.

On April 19, 1988, EMS, JNL's contract laboratory for blood work, ran a variety of tests on the Does' blood. Mr. Doe's blood tested positive for HIV. Mrs. Doe's tested negative. Thereafter, on April 21, 1988, the laboratory sent a telecopy of the Does' results to Dr. Lewis L. Stewart, Jr., JNL's medical director. Five days later, Ed Keller, the JNL underwriter in charge of the Does' applications, received a copy of the laboratory results. Keller then rejected Mr. Doe's application.

The notice of rejection mailed to Mr. Doe on April 26, 1988, did not tell him that he had been rejected because of the HIV test. Instead, by mistake, according to JNL, the notice sent to Mr. Doe stated that his application had been rejected "because delivery of the policy was not accepted." But, this oversight was rectified two days later when Oscar Arinder, Mr. Doe's agent, learned that Mr. Doe's application had been rejected for medical reasons. Arinder then communicated this information to Mr. Doe who, in turn, asked Arinder to try to ascertain the specific results of his medical examination. Arinder telephoned JNL's regional office but was unable to obtain the information. Arinder then advised Mr. Doe to submit a written request to JNL for the

information. On May 23 and July 5 of 1988, according to the plaintiff, Mr. Doe sent letters to JNL's Michigan office asking JNL to send all information concerning his medical condition to his physician, Dr. Barry L. White.[6] Mr. Doe's request was not honored.

In May of 1988, Mr. Doe was hospitalized at the Mississippi Baptist Medical Center in Jackson, Mississippi. During his hospital stay, Dr. Eric McVey, a specialist in infectious diseases, visited Mr. Doe and asked him if he had ever exposed himself to any HIV risk factors. Mr. Doe answered in the negative. No blood test was conducted at that time to detect the existence of HIV.

Eighteen months after undergoing the medical examination in connection with his life insurance application, Mr. Doe was hospitalized at Johns-Hopkins Medical Center ("Johns-Hopkins") in Baltimore, Maryland. While there, Mr. Doe was diagnosed as being HIV-positive. Immediately after Mr. Doe tested positive for the HIV virus, Mrs. Doe took an HIV test. Her test, as had the blood test administered by JNL, indicated that she was not HIV-positive. Mrs. Doe has since taken additional tests and all of them have shown that she does not have HIV.

By April of 1991, Mr. Doe's condition had deteriorated and he was again hospitalized at Johns-Hopkins. At that time, Mr. Doe once more wrote to JNL requesting that JNL submit the results of his 1988 medical examination to his physician, Dr. Donald M. Poretz of Annandale, [sic] Virginia. Nine days

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[6]The defendant contests this assertion but, convinced the accuracy of the statement has no bearing on these motions, does not challenge such under these motions.

before Mr. Doe succumbed to AIDS, his doctor received a report from JNL. The report revealed that Mr. Doe had tested positive for HIV in 1988.

DISCUSSION

The pivotal issue this court must resolve is whether under Mississippi law JNL had a duty to disclose to the Does the results of Mr. Doe's medical examination required by JNL as part of its insurance application process. Of course, the existence of a defendant's duty to act or not to act is a fundamental element of tort law. Ward v. Hobart Manufacturing Company, 450 F.2d 1176, 1181 (5th Cir. 1971). A duty may arise specifically by mandate of statute, generally by operation of law under application of the basic rule of common, or frequently out of a contractual relationship. George B. Gilmore Co. v. Garrett, 582 So.2d 387, 391 (Miss. 1991) citing Pinnix v. Toomey, 242 N.C. 358, 362, 87 S.E.2d 893, 897-898 (1955). Whether a defendant is under any duty, the violation of which would subject him to tort liability, is a legal question for the court to determine. Stanley v. Morgan & Lindsay, Inc., 203 So.2d 473 (Miss. 1967).

Inasmuch as this court's jurisdiction is grounded in diversity, the often-cited case of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), commands this court to employ the substantive law of Mississippi to determine the outcome of this dispute. The Mississippi courts, thus far, have not yet spoken definitively to the question of whether an insurer has a duty to disclose to insurance applicants the results of medical examinations which detect that an applicant is suffering from a life-threatening or debilitating disease. Since Mississippi has not

directly addressed this issue, this court must make an Erie-guess as to how the Mississippi Supreme Court would rule. See United Parcel Service, Inc. v. Weber Industries, Inc., 794 F.2d 1005, 1008 (5th Cir. 1986) ("when making an Erie-guess in the absence of explicit guidance from the state courts, we must attempt to predict state law, not to create or modify it.").

Plaintiff, too, states that the Mississippi Supreme Court has not dealt with the specific issue before the court in this case. Nevertheless, says plaintiff, firmly embedded in Mississippi jurisprudence are accepted causes of action which would accommodate the theory of liability here being urged. Firstly, says plaintiff, JNL's duty arose out of a confidential relationship with her and her husband. Secondly, by requiring plaintiff's husband to take a medical examination and to disclose his confidential medical history, plaintiff says JNL undertook an act toward the Does that required JNL to act reasonably and with due care. Thirdly, says plaintiff, because she and her husband were JNL policyholders and because they completed insurance applications with JNL, JNL had a duty to conduct its affairs in good faith and fair dealing. Fourthly, says JNL, this court should impose a duty on JNL, says plaintiff, because it was foreseeable that harm would ensue from JNL's failure to inform plaintiff and her husband of Mr. Doe's HIV-positive status. The court will address each of these arguments.

CONFIDENTIALITY OF THE RELATIONSHIP

According to plaintiff, the occasion which brought her and her husband together with JNL created a confidential relationship because JNL demanded access to confidential information and retained exclusive control of Mr. Doe's

medical test results. This confidential relationship, argues plaintiff, was special and placed on JNL certain duties, one of which was to disclose the adverse results of medical examinations. Plaintiff relies heavily upon the case of Lowery v. Guaranty Bank and Trust Co., 592 So.2d 79 (Miss. 1991), as her authority, particularly the statement in Lowery that:

> A confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger.

Id. at 83. (Emphasis added). However, the above quote from Lowery does not embrace the facts sub judice to establish the existence of a confidential relationship. Lowery involved a demonstrated course of conduct between the parties whereby the plaintiff was justified in relying on the defendant bank to protect a particular interest which was at stake. The defendant bank had a history of dealing with the plaintiff and her husband whereby the bank would place certain notes on hold until the husband could come in and take care of them. During this course of dealings, the plaintiff's credit life insurance was allowed to lapse and this resulted in the plaintiff not having the benefit of such credit life insurance upon the death of her husband. The Court held that because of the course of conduct between the parties the plaintiff and her husband had justifiably relied on the defendant bank to their detriment.

> The evidence indicates that because of the history of dealings with (defendant) and because the

> (defendant) bank placed the notes on hold until (plaintiff's husband) could come in and take care of them (the plaintiff and her husband) relied on that relationship and placed trust and confidence in (the bank) to the point of being less vigilant about the coverage of their credit life insurance than they had been in the past. If that were the case, the bank owed them the duty to notify them that the credit life insurance had lapsed and that it would not be in force while they waited on (plaintiff's husband) to return.

Id. at 85.

Thus, relative to the creation of a confidential relationship, Lowery holds that there must be something about the relationship between the parties which would justifiably create an expectation on the part of one party that the other was protecting the first party from the occurrence of a particular risk; and, moreover, such justifiable reliance must have necessarily caused the first party to be lulled into a false sense of security so that the first party did not protect his own interest as he might have ordinarily.

The factual urgings here simply fail to allow plaintiff here to step into the status of the Lowery plaintiff. Unlike the defendant bank in Lowery, JNL in no way mislead the Does into any inaction. JNL never promised the Does that JNL would warn them of any medical risks to their health, nor did JNL ever advise the Does that its silence as to the specific result of the medical examination should be construed as a positive medical finding. To the contrary, JNL here specifically advised the Does that JNL undertook simply to determine for itself whether it would accept the risk of

providing insurance coverage to the Does. This set of circumstances hardly shows any justifiable reliance by the Does that JNL would do anything other than perform the limited function of a life insurance business, i.e., consider their applications for life insurance and possibly extend life insurance coverage upon any acceptance of such applications. Moreover, there is absolutely no proof that the Does in any way relaxed the care and vigilance that they would normally have exercised in looking out after their own health conditions in reliance upon any finding by JNL.

DUTY TO PROTECT LIFE AND LIMB

Plaintiff says that by requiring her and her husband to submit to medical examinations, JNL undertook "the performance of an act" which required JNL to act reasonably and with due care, citing Dr. Pepper Bottling Co. v. Bruner, 245 Miss. 276, 148 So.2d 199 (1962). In Dr. Pepper, while delivering soft drinks to a local drug store, a Dr. Pepper employee pushed a cart loaded with soft drinks into the plaintiff's leg. Id. at 200. On appeal, Dr. Pepper contended that it was entitled to a preemptory instruction. Id. However, the Mississippi Supreme Court affirmed the lower court and gave the following discussion about duty:

> As a general rule, it is the natural inherent duty owed by one person to his fellowmen, in his intercourse with them, to protect life and limb against peril, when it is in his power to reasonably do so. The law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully, will be dangerous to other persons — the duty to exercise his senses and intelligence to avoid injury, and he may be

> held accountable at law for an injury to person or property which is directly attributable to a breach of such duty ... Stated broadly, one who undertakes to do an act or discharge a duty by which conduct of others may be properly regulated and governed is under a duty to shape his conduct in such manner that those rightfully led to act on the faith of his performance shall not suffer loss or injury through his negligence.

Dr. Pepper, 148 So.2d at 201.

So, while it is true that JNL had a duty to conduct its affairs reasonably and with due care, in this case that duty did not require JNL to protect plaintiff and her husband from harm from any force(s) that JNL did not set into motion. Dr. Pepper Bottling Co. v. Bruner, then, has no coverage over the facts here.

Plaintiff also cites several cases in which physicians have been found negligent for acts they performed even though no physician-patient relationship existed, the principal case of which is Meena v. Wilburn, 603 So.2d 866 (Miss. 1992) (holding that "a doctor may be held liable for negligence if the traditional elements — duty, breach of duty, causation, and injury — are evidenced, where such liability is not negated by the absence of a doctor-patient relationship."). Meena, however, is not applicable here.

In Meena, a physician negligently instructed his nurse to remove the staples from the wrong patient's leg. When the physician undertook the task to treat the patient, he commensurately undertook a duty to perform that task with care. See George B. Gilmore Co. v. Garrett, 582, So.2d 387,

391 (Miss. 1991). As a result of the physician's negligence, the patient was injured.

The instant case is quite different. JNL is not a physician, but an insurance company. Additionally, there is no evidence here showing plaintiff to have been treated by a physician. Rather, plaintiff merely submitted blood samples that were later tested by a laboratory. This factual scenario hardly equates to that of Meena, which simply involved a physician, who, because of his special discipline, is under a special duty. Moreover, here there is no evidence that JNL acted or failed to act in such a way which facilitated Mr. Doe's contraction of and eventual death from A.I.D.S.

Plaintiff also urges this court to follow Meinze v. Holmes, 532 N.E.2d 170 (1987). In Meinze, the plaintiff argued that a disability insurer had a duty to inform the insured about significant medical information it had acquired by reason of examination of the insured person and his medical files. The Meinze Court held that the disability insurer fulfilled its duty when it delivered copies of its physicians' reports to plaintiff's attorney. Id. at 174.

Contrary to plaintiff's view, Meinze does not stand for the proposition that an insurer is under an absolute duty in all circumstances to disclose to the insured a newly discovered medical risk or danger unknown to the insured. In fact, the Meinze Court specifically stated that because the record was lacking, it was unable to determine "what sort of circumstances will create a duty to disclose, what is the extent of that duty, and what actions will fulfill it." Id. at 173. The Meinze Court stated instead that it was "unwilling to develop a comprehensive statement of the duty to disclose beyond the requirements of the appeal." Id. Accordingly, the

Court found that the only question it needed to address was, in light of the mode of disclosure utilized, whether under the circumstances the duty of care was fulfilled by that disclosure. Id. at 173. Thus, Meinze stands only for the proposition that where the insurer discloses information, such disclosure must be done with due care.

A further distinguishing factor of Meinze is that there was a relationship between the insurer and insured. The plaintiff in Meinze had a disability policy with the insurer. Here, there was no relationship (i.e., contract) between the plaintiff and her husband and JNL as it relates to their 1988 applications. The Does merely completed applications for life insurance coverage. JNL accepted the applications for processing. JNL, however, did not accept Mr. Doe's offer to sell him a policy. As such, the Meinze relationship between the parties there is lacking here.

Additionally, plaintiff cites a litany of cases which plaintiff insist holds that an employer or prospective employer owes a duty to convey the results of medical exams it requires an employee or prospective employee to take. See Daly v. United States, 946 F.2d 1467 (9th Cir. 1991) (where employer was a hospital and pre-employment exam was conducted by hospital physician, court extended the physician's duty to disclose beyond the physician/patient relationship); Green v. Walker, 910 F.2d 291 (5th Cir. 1990) (court held when individual is required, as condition of future or continued employment, to submit to medical examination, that examination creates a relationship between examining physician and examinee); Wojcik v. Aluminum Co. of America, 183 N.Y.S.2d 351, 356 (N.Y. 1959) (court held complaint stated cause of action which alleged employer

gratuitously provided medical examinations to its employees, had a policy of revealing any irregularities, discovered that plaintiff who relied upon the policy had a serious disease, but did not disclose same to him); Dornak v. Lafayette General Hospital, 399 So.2d 168, 170 (La. 1981) (court held that hospital employer was obligated to disclose to plaintiff any dangerous condition realized at a pre-employment examination conducted by hospital physician); Betesh v. United States, 400 F.Supp. 238, 246 (D.D.C. 1974) (Government breached its own policy of advising rejected examinees to seek medical attention. Furthermore, "having assumed to act, the Government physicians were under a duty to act carefully, not merely in the conduct of the examination but also subsequent communications to the examinee."); Beadling v. Sirotta, 197 A.2d 857 (N.J. 1964) (court did not reach the issue of employer liability). These cases are not persuasive. Upon close scrutiny of each of these cases, it becomes apparent that plaintiff's interpretation of these cases is either erroneous or that the case is clearly distinguishable. These cases deal either with the extension of the duty of a physician hired by a hospital employer (Daly v. United States, 946 F.2d 1467 (9th Cir. 1991); Dornak v. Lafayette General Hospital, 399 So.2d 168, 170 (La. 1981)), with employers which violated their own documented disclosure policy (Betesh v. United States, 400 F.Supp. 238, 246 (D.D.C. 1974)), Wojcik v. Aluminum Co. of America, 183 N.Y. 2d 351 (N.Y. 1959), or with circumstances where the courts did not even reach the issue of employer liability with regards to non-disclosure (Green v. Walker, 910 F.2d 291 (5th Cir. 1990); Beadling v. Sirotta, 197 A.2d 857 (N.J. 1964)). As earlier stated, the instant case does not involve the violation of a documented disclosure policy nor treatment by

a physician.

Where a physician is directly involved, people have a right to expect a certain degree of care and disclosure on their health and health related matters regardless of whether a doctor/patient relationship exists. See Meena v. Wilburn, 603 So.2d 866 (Miss. 1992). Indeed, disclosure to, at least, the patient is essential to the treatment and retardation of diseases and other ailments. However, this court is not persuaded, nor does Mississippi law support such a conclusion, that an insurance company should bear the same burden of care as a physician, i.e. divulging the results of a medical examination. A physician and an insurance company, serve to different purposes in our society. A physician is sworn to protect and respect human life. An insurance company, on the other hand, by insuring those individuals it perceives as "insurable," is here to soften the blow of natural and artificial disasters, be it death, fire or flood. To hold insurance companies to the same standard as physicians would be to expect expertise on health related matters from an entity which hasn't the knowledge or the resources.

The Mississippi Supreme Court case of Puckett v. Refenacht, Bromagen, & Hertz, 587 So.2d 273 (Miss. 1991), sheds some light on the instant issue, although it is not a case involving the duty to protect life and limb. Therein, the Mississippi Supreme Court stated:

> If a society is to be free, it must demand of every person who, completely on his own, makes a mistake that he has no legal right to shift from his shoulders onto another's the suffering it causes. In our modern society, en masse we are our brother's keepers; we pay taxes for schools, highways,

> public health and hundreds of other public programs. On an individual basis, however, no man should be required by law to pay for what was solely and purely another man's mistake.
>
> It may be morally reprehensible for one man to watch another open a window on the twentieth floor of a skyscraper, climb through it and jump out, when he could have easily reached out and stopped him. To impose a legal responsibility upon the bystander to stop him, however, is an entirely different matter.

Puckett, 587 So.2d at 278. In other words, where a party does not create or cause the peril, said party is under no obligation to prevent the consequences of the peril. Accordingly, plaintiff's reliance upon the rubric in Dr. Pepper for her "duty to protect life and limb" claim is misplaced. JNL did not infect Mr. Doe with H.I.V. This being so, JNL was under no obligation to inform Mr. Doe that he was so infected, even though this may have been the morally correct thing to do.[7]

DUTY OF GOOD FAITH AND FAIR DEALING

Plaintiff says that JNL owed a duty to her and her husband because of its contractual relationship with them —

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[7]Of course, this court is aware of at least one case (outside the State of Mississippi) where a plaintiff sued a medical provider for incorrectly advising her that she had AIDS, where over a two-year period she had altered her lifestyle and prepared for death. Although this point was not specifically mentioned by JNL, perhaps this fear of being wrong and having to face a possible lawsuit prompted it to refuse to make disclosure. But this is pure speculation on the court's part.

the Does were JNL policyholders and they applied for insurance with JNL in 1988. Consequently, says plaintiff, JNL owed them a duty of good faith and fair dealing. See Cenac v. Murray, 609 So.2d 1257, 1272 (Miss. 1992) (stating that every contract imposes upon each party a duty of good faith and fair dealing).

The duty of good faith and fair dealing, which applies to both the insurer and the insured "requires abstinence by all parties from commission of wrongful conduct which injures 'the right of [the another] to receive the benefits of the agreement.'" Andrew Jackson Life Insurance Co., v. Williams, 566, So.2d 1172 (Miss. 1990) citing Shipstead & Thomas, Comparative and Reverse Bad Faith.

Any contractual relationship between Mr. Doe and JNL was based upon the life insurance policy already in existence at the time he applied for and was later denied additional coverage. There is no indication from the record that JNL did not fulfill its obligation to Mr. Doe under the first insurance policy. As for Mrs. Doe, although she and JNL had a contractual relationship via her own life insurance policy, there is no indication that the defendant, by not divulging Mr. Does condition to Mrs. Doe, interfered with Mrs. Doe's rights to receive the benefits of the agreement between Mrs. Doe and JNL.

DUTY TO WARN OF FORESEEABLE HARM

Plaintiff says that this court should impose a duty on JNL in this case because it was foreseeable that harm would likely ensue from a given act or omission. Plaintiff points to Foster v. Bass, 575 So.2d 967 (Miss. 1990), for support. In Foster, the father of an adopted child suffering from mental

retardation caused by Phenylketonuria (PKU) brought an action against, inter alia, the private adoption agency, alleging that defendant was negligent in failing to test the child for PKU at the time of his birth and negligent in failing to provide proper medical information. Foster, 575 So.2d at 968. Pursuant to defendant's motion, the trial court granted summary judgment, concluding "that there [was] no evidence which would allow a reasonable jury to conclude that [the defendant] breached a duty proximately causing [the plaintiff's] injury. Id. at 969. On appeal, the Mississippi Supreme Court, also refused to impose a duty on Catholic Charities for failing to ensure that a child placed through its adoption agency had been tested for Phenylketonuria ("PKU"). Id. at 981.

On its way to its decision, the Mississippi Supreme Court conducted a foreseeability analysis, starting with the following observation:

> For actionable negligence to exist, the defendant must owe the plaintiff a legal duty. We noted Mississippi's adoption of this universal principle in Ward v. Hobart Mfg. Co.
>
> A duty does not exist, "[i]f the defendant could not reasonably foresee any injury as the result of his acts, or if his conduct was reasonable in the 'light of what he could anticipate'" ... The rationale behind this foreseeability requirement is that no one is expected to guard against events which are not reasonably to be anticipated or that are so unlikely that the risks would be commonly disregarded.

Karpovs v. State, 663 F.2d 640, 649 (5th Cir. 1981)(citations omitted).

Foster, at p. 975.

Then, after detailing a number of factors which countered this foreseeability requirement, namely, the rarity of the disease, the lack of physical symptoms, the absence of medical doctors on the agency's staff, the agency's reliance on outside physicians and the adopting parents' responsibility to obtain certification from their own pediatrician that the adopted child was in good health, the Mississippi Supreme Court held as a matter of law that Catholic Charities reasonably could not have foreseen the injury from its failure to inform the doctors that the adopted child had not been tested for PKU.

The holding and analysis in Foster do not serve as any basis for liability here. Foster does not stand for the recognition of any duty owed by JNL to the plaintiff. The foreseeability of harm analysis undertaken by the Mississippi Supreme Court was simply one of the policy factors considered by the Court in determining whether a duty existed in Foster.[8] After balancing the relevant factors, the

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[8]"The policy factors which must be considered in determining whether a duty exists have been judicially defined as follows: the foreseeability of harm, the degree or certainty of injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, costs, and prevalence of insurance for risk

(continued...)

Mississippi Supreme Court stated that:

> There also is no evidence which supports a finding of foreseeability of harm to Geoffrey as a consequence of a blank on Catholic Charities' medical information form, such that the form would be deemed the proximate cause of his damages.

Foster, at p. 983.

The Foster holding applies here against the plaintiff. There is no evidence here to show JNL's failure to disclose the results of its test proximately caused John Doe's damages. John Doe was stricken with the disease before he undertook application for additional insurance with JNL. Once JNL rejected his application on medical grounds, John Doe was on notice that JNL was of the opinion that he had some uninsurable medical ailment detected from tests on his urine or blood. It would have been a simple matter for John Doe to submit urine and blood samples to his own physician for further testing. JNL could reasonably have expected John Doe to follow this course. John Doe instead did not place his physician on notice of JNL's rejection and later even told his hospital physician that he had no reason to suspect he had AIDS, a statement which persuaded the hospital physician not to test for the disease. These facts simply fail to show any liability by JNL to plaintiff under any analysis conducted under Foster.

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[8](...continued)
involved." Foster, 575 So.2d 967, 979 (Miss. 1990) quoting Richard P. v. Vista Del Mar Child Care Service, 106 Cal. App.3d 860, 165 Cal.Rptr. 370 (1980).

CONCLUSION

Having explored the juridical theories advanced by plaintiff, this court finds that none of them under Mississippi law subjects defendant to liability here for failing to disclose the results of its test on plaintiff's blood. Accordingly, this court grants defendant's motion for summary judgment. The plaintiff's motion for partial summary judgment is denied. A separate judgment shall be entered in accordance with the local rules.

SO ORDERED AND ADJUDGED, THIS THE 29th DAY OF SEPTEMBER, 1995.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE

[DISTRICT COURT CAPTION]

FINAL JUDGMENT

This cause came on for hearing on the motion of the defendant for summary judgment. After consideration of the motion, evidence offered in support of the motion, and the arguments in memoranda of the parties, the court finds that the motion is well taken and should be granted. The Memorandum Opinion and Order of this court dated September 29, 1995, and the findings of fact and law included therein are incorporated by reference. For the reasons assigned in that order, the court concludes that judgment should be entered in favor of the defendant and against the plaintiff and that the defendant should be awarded its costs. Additionally, the plaintiff's motion for partial summary judgment is denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the complaint be, and it is hereby DISMISSED WITH PREJUDICE in accordance with this court's order at the cost of the plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is entitled to recover its taxable costs in this action upon filing a Bill of Costs in the time and manner prescribed.

SO ORDERED AND ADJUDGED, THIS THE 29th DAY OF SEPTEMBER, 1995.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE

[Filed August 7, 1996]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60675

JODY DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,

Plaintiffs - Appellants,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Mississippi

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Before KING, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

The judgment of the district court is affirmed on the basis of the district court's Memorandum Opinion and Order attached hereto.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-60675

JODY DERAMUS, Individually and as Administratrix of the Estate of Frank Deramus,

Plaintiffs - Appellants,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant - Appellee

* * *

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 8/7/96, 5 Cir., _____, _____ F.3d _____)

(SEPTEMBER 10, 1996)

Before KING, SMITH and WIENER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

[signature illegible]

United States Circuit Judge